Supreme Court, U.S.
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No. 00-461

IN THE

Supreme Court of the United States

RONNIE B. GREER,

Petitioner,

v.

DEBRA H. AMESQUA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY OF PETITIONER TO RESPONDENTS' BRIEF IN OPPOSITION

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No. 00-461

In The

Supreme Court of the United States

RONNIE B. GREER,

Petitioner,

v.

DEBRA H. AMESQUA, ET AL.,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

In his petition, Ron Greer argued that the Seventh Circuit decision (1) conflicts with other circuits' application of the *Pickering* balance by approving a government employer's refusal to consider the truth or reasonableness of a whistle blower's charges and (2) presents significant constitutional questions (a) whether the *Pickering* balance requires such consideration, (b) whether high ranking gay and lesbian

administrators are entitled to special protection from criticism for violation of laws prohibiting favoritism based on sexual orientation and (c) whether employers may rely on evidence in district court which they neither investigated nor considered in the *Waters* proceedings.

Respondents argue that (1) the lower courts did not refuse to consider the truth of Greer's News Release, (2) the Seventh Circuit decision creates no conflict among the circuits and (3) an employer may rely in district court on evidence it neither investigated nor considered in its termination decision.

I. RESPONDENTS DRASTICALLY MISSTATE THAT THE LOWER COURTS "ASSUMED THE TRUTH" OF GREER'S NEWS RELEASE.

Without citation, Respondents mischaracterize the Seventh Circuit decision, claiming that the court assumed Greer's statements were true. Resp. Brief 24. However, the court explicitly approved the PFC's refusal to consider the truth of Greer's statements at all.

> In addition, Greer complains that the PFC excluded testimonial evidence which he claims would prove that his charges against Amesqua were true. . . . . With respect to a First Amendment retaliation claim, the relevant inquiry is whether the employer had reasonable grounds to believe that the employee had violated its rules and that its interests as an employer outweighed the employee's free speech interests. . . . . The PFC hearing was quite sufficient under this standard . . . .

Greer v. Amesqua, 212 F.3d 358, 368 (7th Cir. 2000). (Pet.-Ap. 15a.)

Respondents also argue that the PFC did not condition Greer's rights on the truth of his speech. Resp. Brief 21. But they do not dispute that the PFC refused to consider the truth or reasonableness of Greer's speech, and they ignore the

fundamental issue whether the PFC *should* have considered it.

Protecting the public's right to be informed about favoritism and corruption is a paramount public and governmental interest. (*See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 - 36 (1991) and *Nebraska Press Association v. Stuart*, 427 U.S. 539, 606 (1976) (J. Brennan, concurring). Clean government is a "quintessential" public concern. *Greer v. Amesqua*, 212 F.3d at 371 (citations omitted) (Pet.-Ap. 21a). Given the primacy of those interests, it is critical that this Court advise the circuits whether an employer may terminate a whistle blower for allegations of corruption without considering whether those allegations are true or reasonable.

II. THE COURT OF APPEALS DECISION CREATES CRITICAL DISAGREEMENT AMONG THE CIRCUITS

Respondents next argue that there is no conflict among the circuits and that, at most, there is only an internal conflict in the Seventh Circuit. Resp. Brief 24 - 26. However, after an exhaustive search of Seventh Circuit decisions (both before and after *Waters*), Petitioner is aware of no other case in which a government employer or court applying *Pickering* simply refused to consider substantial and credible evidence offered by a whistle blower that his accusations were true or well founded.

Since the decision in this case must be construed as consistent with prior holdings (*see, e.g., MCI Communications Corp. et al. v. American Telephone and Telegraph Co.*, 708 F.2d 1081, 1122 (7th Cir. 1982)), the Seventh Circuit must now be considered to leave within the employer's discretion whether to consider evidence substantiating a whistle blower's accusations. Such a holding directly conflicts with other circuits which have held repeatedly that it is improper and "absurd" to discharge a whistle blower whose well-founded allegations cause disruption in the office of a corrupt employer. *See* Petition, 17 - 21.

Respondents also reiterate the Seventh Circuit's mischaracterization of Greer's argument that he asked for "absolute protection" of true statements. Resp. Brief, 23 - 24. But Greer has *never* sought absolute protection of true speech, only that the truth or reasonableness of his statements be considered as part of the *Pickering* balance.

Finally, Respondents argue that Greer saw only a videotape of the Holtz-Cato incident and that an employer under *Waters* need only consider an employee's knowledge based on direct, first hand observation. Resp. Brief, 10-14. Such a prophylactic rule yields horrific results. Had the Los Angeles Police Department disregarded the Rodney King videotape and whitewashed the beating, a veteran officer disciplined for publicly questioning the whitewash could not have argued that his statements were true or reasonable based on his experience and his viewing the tape. Again, it is critical that this Court consider whether and under what circumstances discretion to consider the truth or reasonableness of a whistle blower's statements may be left within the discretion of a corrupt employer who is the very target of the charges.

III. THE COURT SHOULD CLARIFY WHETHER DISTRICT COURTS MAY RECEIVE EVIDENCE NOT INVESTIGATED OR CONSIDERED BY AN EMPLOYER IN DISCHARGE PROCEEDINGS

Respondents' summary judgment motion was based entirely on evidence developed during the district court litigation almost one year after the PFC issued its decision. *See* Petition, 12 - 14. Respondents claim that the lower courts did not utilize their post-hearing evidence except for "background facts."[1]

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[1] Respondents deny that their post-hearing evidence was critical, yet their Statement of Facts relies exclusively on that evidence. Of their 147 references to the district court record, 105 are to Greer's post-PFC hearing deposition and twenty-one are to Debra Amesqua's

Resp. Brief, 28. However, the district court based its decision on a lengthy, one-sided recitation of Greer's disciplinary history taken directly from Amesqua's post-hearing affidavit. *See* Petition, 12 - 13. The Seventh Circuit relied almost exclusively on Respondents' post-hearing submissions without even acknowledging that Greer had challenged them. *See* Petition, 13 - 14, Pet.-Ap. 2a - 5a.

Alternatively, Respondents argue they were entitled to rely on new evidence because Greer raised his First Amendment rights for the first time in district court. Resp. Brief, 27. That is a blatant misstatement of the record. The PFC acknowledged Greer's First Amendment claims and ruled on them explicitly. Pet.-Ap. 100a - 104a.

Respondents next argue that an employer which failed to consider a *Pickering* factor such as potential disruption during a termination hearing would be barred from presenting such evidence in a subsequent civil rights suit. Resp. Brief, 29. But the purpose of a civil rights suit is to find out what an employer *did* rely on in terminating an employee, not what it *might* have relied on. If, in fact, the employer has a full and fair opportunity to litigate an issue in an administrative proceeding and does not do so, the employer is foreclosed from relitigating the issue by the doctrine of "administrative *res judicata*." *See, e.g., Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 485 n. 26 (1982). *Waters* requires a reasonable investigation, and this Court should provide guidance whether an employer is barred from presenting *post hoc* evidence it neither investigates nor considers in discharging an employee.

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post-hearing affidavit. Of seventeen references to the actual hearing record, ten cite the work rules at issue, seven cite the News Release, and four cite the PFC decision. Resp. Br. 7 - 8, 11. Respondents present *no* citations to the evidentiary record.

IV. PETITIONER DID NOT WAIVE ANY ISSUES PRESENTED IN HIS PETITION

Last, Respondents make several waiver arguments, *none* of which they have previously presented in any court. They state that Greer could make whatever statement he wanted to at the hearing, apparently implying that he had the opportunity to present the truth of his position before the PFC. Resp. Brief 16. Again, this is factually misleading. The hearing they reference was an investigative hearing, not the discharge hearing. Further, despite Greer's failure to recall the details of that investigative at his deposition over two years later, Respondents well know that Greer was ordered to appear and answer a prepared list of sixty-three questions prepared by the City Attorney. Greer was not permitted to present any defenses or even deviate from or ask for clarification of the questions. Pet.-Rep.Ap. 1a - 3a.

Without citation, Respondents also argue that having foregone state appellate review of the Commission's decision, Greer cannot obtain review in a federal court civil rights lawsuit. Resp. Brief 22. This claim borders on the frivolous. It is well settled that exhaustion of state remedies is not required to commence an action under 42 U.S.C. § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982).

Finally, again without citation, Respondents argue that the "appropriate challenge to evidentiary determinations by the fact finder in a state administrative proceeding is through the appeal channels allowed by state statute, not through federal court review." Resp. Brief, 7. Besides ignoring *Patsy*, Respondents also ignore well settled law that where a state administrative agency incorrectly exclude as irrelevant an employee's evidence offered to sustain a constitutional defense, the employee has been deprived of a full and fair opportunity to litigate the issue, and his § 1983 action is permitted to proceed. *Balcerzak et al. v. City of Milwaukee, et al.*, 163 F.3d 993, 997 (7th Cir., 1998) (citing *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

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1. Hearing Transcript, p. 94 – 95, App. 547

BEFORE THE BOARD OF POLICE & FIRE
COMMISSIONERS
CITY OF MADISON

In Re: The Charges Of

CHIEF DEBRA AMESQUA,
Complainant,

-vs-

RONNIE B. GREER,
Respondent.

TRANSCRIPT OF PROCEEDINGS

(Whereupon, the following proceedings reconvened on Monday, January 12, 1998, commencing at 7:00 p.m.)

. . . .
. . . .

Q So it's the list of 63 questions, correct?
A Correct.
Q Did you personally write any of these questions?
A I did.
Q All of them?
A No, not all of them.
Q Do you recall specifically which ones you did?
A As I recall Attorney Petri drafted all the questions up to the rule violation questions.

[Excerpt, pages 340.]

. . . .
. . . .
Q Does he have a right to call witnesses?

A No. We typically allow the employee to come in with union and/or legal representation, but the employee is there to speak on his or her own behalf.
Q So he's not entitled to call witnesses?
A I have not been permitting them to bring in witnesses.
Q And that would of course include not being permitted to question the department's evidence either, correct?
A That's correct. He can't question the department. He can ask clarification questions if he doesn't understand my questions, but he can't cross-examine me.
Q And in this case Firefighter Greer was not permitted to call witnesses, was he?
A At the predetermination hearing, no, he was not.
Q And he was not permitted to question any evidence presented by the department, correct?
A He was not permitted to question any evidence, that's correct.
Q You did not give him copies of any of the questions in advance, did you?
A No, I did not.

[Excerpt, pages 343 - 44.]

. . . .
. . . .

Q Chief Saxe, do you believe that the Seven Standards under Section 62.13 (5) (e) (m) require you as the investigating officer to anticipate or investigate any possible defenses to the charges?

. . . .
. . . .

A As I look at the Seven Standards I know that it requires that I conduct a fair and impartial investigation, but I don't know anything in the standards that requires me to look for defenses when I conduct that fair and impartial investigation.
Q So your answer is no?

A No.
Q Thank you. It's also -- strike that.
You believe that you as the investigating officer have the authority to order Firefighter Greer's attendance at the predetermination hearing, don't you?
A As a chief officer I have authority to order Firefighter Greer to do many things, yes.
Q And you also have the authority to order him to answer these questions whether he wishes to or not, is that correct?
A That's correct.

[Excerpt, pages 367.]